

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of the Petition of)
)
THE CITY OF SAN BERNARDINO)
)
For Review of Cease and Desist)
Order No. 90-55 of the California)
Regional Water Quality Control)
Board, Santa Ana Region.)
NPDES Permit No. CA105392.)
Our File No. A-683.)
_____)

ORDER NO. WQ 91-08

BY THE BOARD:

On April 13, 1990, the California Regional Water Quality Control Board, Santa Ana Region (Regional Board), adopted Order No. 90-16 (NPDES No. CA105392), which established waste discharge requirements for the discharge of effluent by the City of San Bernardino (the City) to reaches 4 and 5 of the Santa Ana River. Concurrently with the adoption of Order No. 90-16, the Regional Board adopted Order No. 90-55, directing the City to cease and desist from discharging wastes in violation of Order No. 90-16. On May 11, 1990, the City filed a timely petition for review of Order No. 90-55. This Order denies the City's petition.

I. BACKGROUND

The City currently discharges about 25.5 million gallons per day (mgd) of secondary, disinfected wastewater to reaches 4 and 5 of the Santa Ana River. The discharge of effluent does not comply with several provisions of Order

No. 90-16. Probably the most significant of these provisions is a requirement that tertiary or equivalent treatment standards be met whenever the City's wastewater discharge receives insufficient dilution in the Santa Ana River to protect water contact recreational uses.¹ The tertiary treatment requirements are expressed in Order No. 90-16 as numerical effluent limitations for biochemical oxygen demand (BOD) and suspended solid (SS), as well as a prescribed treatment train or its equivalent, and numerical limitations on coliform bacteria and turbidity.²

Cease and Desist Order No. 90-55 contained a time schedule for the City to come into full compliance with the provisions of Order No. 90-16 and interim effluent limitations for specific parameters.³ The City proposes to achieve compliance with the tertiary or equivalent treatment requirements through the construction and operation of a regional treatment facility, referred to as the Rapid Infiltration and Extraction (RIX) project. The RIX project is being implemented by the Cities of San Bernardino and Colton, through the Santa Ana

¹ Order No. 90-16, Discharge Specification A.5.

² *Id.* A.1.a.i., A.5.i.

³ On June 7, 1991, the Regional Board adopted Cease and Desist Order No. 91-41, rescinding prior Order No. 90-55. Order No. 91-41 was issued because the City was unable to comply with some of the deadlines contained in Order No. 90-55. Order No. 91-41, accordingly, contains a revised time schedule for compliance with the City's NPDES permit. On July 1, 1991, the City filed a petition for review of Order 91-41. The City objects to Order No. 91-41 on the same grounds as Order No. 90-55. This order is intended to dispose of the issues raised by the City in both the May 11, 1990 and the July 1, 1991 petitions.

Watershed Project Authority (SAWPA). It is anticipated that the project will provide a degree of treatment equivalent to that of conventional tertiary facilities.

Order No. 90-16 superseded waste discharge requirements contained in Order No. 85-71, adopted by the Regional Board on July 12, 1985. The latter order was the subject of a petition for review filed by the City in August of 1985 with the State Water Resources Control Board (State Board or Board).⁴ The petition was denied in State Board Order No. WQ 86-14. Order No. WQ 86-14 was subsequently rescinded in State Board Order No. WQ 88-1, in compliance with a peremptory writ of mandate issued in a case entitled City of San Bernardino Municipal Water Dept. v. State Water Resources Control Board, Los Angeles County Superior Court Case No. C 617319. State Board Order No. WQ 88-1 also remanded the matter back to the Regional Board for further action. After the remand, the Regional Board adopted Order No. 88-46, amending Order No. 85-71 in accordance with directives from the State Board and the superior court.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that Cease and Desist Order No. 90-55 contravenes Government Code Section 17516 and Revenue and Taxation Code Section 2209.

Finding: Section 6 of Article XIIIB of the California Constitution requires the state to reimburse local government for the costs of complying with any new program or higher level of

⁴ State Board File Nos. A-401 and A-403.

service mandated by either the Legislature or any state agency. In order to implement Section 6, in 1984 the Legislature enacted Part 7, Division 4 of Title 2 of the Government Code, commencing with Section 17500.

Discussion: Section 17514 of the Government Code defines "costs mandated by the state" to include increased costs incurred by a local agency as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975. Thus, a state mandated program must be attributable to either a statute or an executive order.

Government Code Section 17516 defines the term "executive order" to exclude "any order, plan, requirement, rule or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code". After this exclusionary language, Section 17516 contains the following wording:

"It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. 'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility."

The language in Government Code Section 17516 was derived from the language contained in Revenue and Taxation Code Section 2209. Section 2209 was enacted in 1974 and amended in 1975. The section contains language essentially identical to the wording of Section 17516.

In State Board Order No. WQ 86-14 the Board addressed a challenge by the City to the waste discharge requirements contained in Regional Board Order No. 85-71 on the ground that the requirements contravened the statement of legislative intent contained in the two code sections. The Board found it unnecessary to decide the issue at that time because the statement of intent refers only to "enforcement orders", and the Regional Board had not yet issued an enforcement order.

The Regional Board has now issued a cease and desist order, and the City has renewed its challenge. The City alleges that it is a publicly owned discharger and that the tertiary treatment required by Regional Board Order Nos. 90-16 and 90-55 will cost in excess of 20% of the cost of replacing its treatment facilities. Therefore, the City contends that issuance of Cease and Desist Order No. 90-55 was improper and that the order should be set aside.

In addition to the proceedings before this Board, the City of San Bernardino Water Department filed a test claim on November 26, 1986, with the Commission on State Mandates (the

Commission).⁵ The City's test claim alleged that Regional Board Order No. 85-71 and subsequent orders resulted in reimbursable state mandated costs by requiring the City to build a tertiary treatment plant.⁶

This Board and the Regional Board recommended that the Commission deny the test claim based on a number of reasons.⁷ These included: (1) The orders in question do not impose a new program or a higher level of service; (2) The orders implement pre-1975 statutes; (3) The orders are not "executive orders"; (4) The orders implement federal law; and (5) The claimant has the authority to levy service charges, fees, and assessments sufficient to pay for costs incurred by the City.

On February 28, 1991, the Commission voted unanimously to deny the City's claim.⁸ The Commission determined that the orders in question were issued pursuant to Division 7 of the Water Code and, hence, do not fall within the meaning of an "executive order" as defined in Government Code Section 17516. Secondly, the Commission held that the costs incurred by the City

⁵ Commission File No. CSM-4250. A "test claim" is the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the State. Gov. Code Sec. 17521.

⁶ The Orders include Regional Board Order Nos. 85-71, 88-46, 88-86, 89-114, 90-16, and 90-55. These Orders consist of the City's NPDES permit, amendments to the permit, and cease and desist orders enforcing the permit issued to the City relative to its discharge to the Santa Ana River.

⁷ See Recommendation, No. CSM-4250, filed August 30, 1990, by William R. Attwater, Chief Counsel, State Board.

⁸ See Statement of Decision, CSM-4250, adopted March 28, 1991, by the Commission (Statement of Decision).

to comply with the orders are not "costs mandated by the state" because the orders do not qualify as "executive orders".

Finally, the Commission found that the City has ample statutory authority to levy service charges, fees, or assessments to pay for the costs incurred in complying with the orders.⁹

Part 7, Division 4 of Title 2 of the Government Code provides the exclusive remedy for resolution of claims by local agencies alleging that costs incurred by them are reimbursable state mandated costs. Gov. Code Sec. 17552. The only remaining issue before this Board, therefore, is, given that the Regional Board orders do not impose state mandated costs, are the orders nevertheless invalid because they were issued in contravention of the statement of legislative intent contained in Government Code Section 17516 and Revenue and Taxation Code Section 2209.

The Commission agreed with the Board that the express terms of the intent language are precatory in nature expressing a desire or wish on the part of the Legislature. Specifically, the Commission found that the language evidences a "'desire ... that enforcement orders against public dischargers not be adopted unless federal and state financial assistance is available for the discharger'".¹⁰ The Commission noted, however, that the intent language is aimed at the State Board and the Regional Boards, rather than the Commission, and that an administrative

⁹ Under subdivision (d) of Government Code Section 17556, the Commission is precluded from finding "costs mandated by the state" if a local agency has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

¹⁰ See Statement of Decision at 7.

proceeding before the State Board is the appropriate vehicle to challenge the validity of a Regional Board order which a waste discharger contends was issued contrary to law.¹¹

This Board took the position in the mandate proceedings before the Commission that the Regional Board orders in question are valid. Our position remains unchanged.

The Board cited two principal reasons for this stance. First, we found that state and federal financial assistance in the form of low interest loans was made available to the City. Secondly, we interpret the intent language of Government Code Section 17516 and Revenue and Taxation Code Section 2209 as precatory, rather than mandatory. We will review these arguments below.

A. Availability of Financial Assistance

In prior mandate proceedings, the Commission has held that the requirement of Government Code Section 17516 that financial assistance be "simultaneously made available" does not require that financial assistance be "awarded", just "available". See Decision in Claim of San Lorenzo Valley Water District, CSM-4202, May 26, 1988, at 14 (San Lorenzo). In San Lorenzo the Commission stated that "available" means accessible through the grant application procedure. *Id.* Further, the Commission found that financial assistance was "available" even though amendments to the federal Clean Water Act, U.S. Code Section 1251 et seq., caused the San Lorenzo claimant to be unable to qualify for grant

¹¹ *Id.* at 10.

funding. The Commission concluded that it must be assumed that the Legislature was aware of amendments to the Clean Water Act which reduced the grant funding authorized under the federal grant program when the Legislature incorporated the language of Revenue and Taxation Code Section 2209 into Government Code Section 17516 in 1984.

More recent amendments to the Clean Water Act have changed the grant program to a loan program. See 33 U.S.C. Sec. 1281 et seq. Under these amendments, the Environmental Protection Agency (EPA) makes grants to each state for the purpose of establishing a water pollution control revolving fund for providing assistance for construction of treatment works which are publicly owned. See id. California has titled its program the "State Water Pollution Control Revolving Fund (SRF)". See Water Code Sec. 13475 et seq.

State and federal financial assistance in the form of low interest SRF loans is available to the City under this program. Financial assistance has, in fact, been awarded for the first portion of the City's RIX project. On August 16, 1990, the Board approved a SRF loan for the RIX demonstration project proposed by the City and the City of Colton. At the City's request, the State Board also granted a waiver of its policy which prohibits loan funding for purchase of land in order to authorize the City and the City of Colton to use loan funding for the purchase of land necessary for the RIX demonstration project.

The complete RIX project is on the State Board's 1991 priority list for SRF loans. The project is also on the proposed priority list for 1992. For these reasons, we conclude that federal and state financial assistance was simultaneously made available to the City when the Regional Board's enforcement orders were adopted.

B. Statutory Interpretation

The City alleges that the Regional Board's enforcement orders mandate major sewage treatment construction costs. The City contends that the orders are, therefore, invalid because they were issued in contravention of the statement of legislative intent contained in Government Code Section 17516 and Revenue and Taxation Code Section 2209. The City's interpretation of the intent language contained in these two code section would create an exception to the Regional Boards' general authority to issue enforcement orders under Division 7 of the Water Code.

We do not concur with the City's position. The City's construction of the two code sections is inconsistent with the express wording of the sections as well as with the federal Clean Water Act and Division 7 of the Water Code. The meaning of a statute must be sought, in the first instance, in the language in which the statute is framed. E.g., Leroy T. v. Workmen's Compensation Appeals Board, 12 Cal.3d 434, 115 Cal. Rptr. 761, 525 P.2d 665 (1974). In this case the statements of legislative

intent are simply that--expressions of intent. As such, we conclude, as did the Commission, that the language is precatory, rather than mandatory.

Further, a construction of the code sections to require financial assistance as a precondition to issuance of an enforcement order is inconsistent with the Clean Water Act. As we stated in our Recommendation to the Commission:

"Under the Clean Water Act, enforcement against a publicly owned treatment work does not trigger any requirement for availability of financial assistance. '[I]t is a fundamental that the compliance and grant provisions of the [Clean Water Act] are not mutually dependent.' (United States v. City of Detroit, 720 F.2d 443, 451 (6th Cir. (1983).) If successful prosecution of an enforcement action triggered a requirement to make funding available, the agency bringing the enforcement action:

"'Would be pragmatically restricted to seeking compliance only in actions where it would guarantee federal funds to effect the compliance judgments obtained. This was patently not the intent of Congress.' (Id.)" Recommendation at 32-33.

The consequences of construing the legislative intent language in the manner suggested by the petitioner must also be considered. See 58 Cal.Jur.3d, Statutes, Sec. 104. In 1972 the Legislature added Chapter 5.5 to Division 7 of the Water Code to ensure that the State had all the authority necessary for a state National Pollutant Discharge Elimination System (NPDES) permit program, as authorized by the Clean Water Act. To further this aim, Chapter 5.5 expressly states that the chapter "shall be

construed to assure consistency with the requirements for state programs implementing the [Clean Water Act]". Water Code Sec. 13372. In enacting Chapter 5.5, the Legislature declared its intent to avoid direct regulation by EPA of persons already subject to waste discharge requirements under Division 7 of the Water Code. Id. Sec. 13370. EPA approved California's NPDES permit program in 1973.

To retain its authority for a state NPDES permit program, the State must have certain enforcement powers. See 33 U.S.C. Sec. 1342(b); 40 C.F.R. Sec. 123.27. These include authority to:

"[R]estrain immediately and effectively any person by order or by suit ... from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment." 40 C.F.R. Sec. 123.27(a)(1).

As this Board stated to the Commission, the State and Regional Boards rely on their authority to issue cleanup and abatement orders and cease and desist orders to help satisfy the requirement that the state possess adequate enforcement authority. A ruling that made enforcement of NPDES permits contingent on the availability of funds would risk withdrawal of EPA approval for the state NPDES permit program. See 33 U.S.C. Sec. 1342(c); 40 C.F.R. Sec. 123.63. Withdrawal is specifically authorized under circumstances where the State's enforcement program fails to comply with the requirements of the federal

regulations. Id. Withdrawal of program approval would result in the issuance of two permits to dischargers subject to NPDES permit requirements -- waste discharge requirements issued by the Regional Board and an NPDES permit issued by EPA. Construction of Government Code Section 17516 and Revenue and Taxation Code Section 2209 to restrict the ability of the State to take enforcement action against NPDES permittees would, thus, clearly conflict with the legislative intent in enacting Chapter 5.5.

A determination that state authority to issue enforcement orders is contingent on the availability of funding would have an additional significant consequence. It would result in EPA bringing its own enforcement actions under Section 309 of the Clean Water Act, where state enforcement is barred. 33 U.S.C. Sec. 1319. This would, additionally, result in dual regulation of individuals subject to the NPDES permit program.

III. SUMMARY AND CONCLUSIONS

The Regional Board did not violate Government Code Section 17516 or Revenue and Taxation Code Section 2209 in adopting Cease and Desist Order No. 90-55.

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IV. ORDER

IT IS HEREBY ORDERED that the City of San Bernardino's petition is denied.

CERTIFICATION

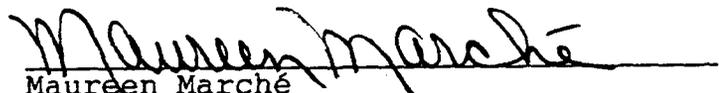
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 18, 1991.

AYE: W. Don Maughan
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board